85-1052

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

BERNAT KUPFERSTEIN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MA (617) 542-1114 • DC (202) 783-7288 • USA (800) 5 APPEAL

QUESTIONS PRESENTED

1. Whether petitioner was coerced into pleading guilty before the Supreme Court of the State of New York, County of Kings, in violation of the Fifth and Fourteenth Amendments of the United States Constitution?

2. Whether petitioner, during his proceedings, prior to his plea of guilty in the Supreme Court of the State of New York, County of Kings, was denied the effective assistance of counsel (Sixth and Fourteenth Amendments of the United States Constitution)?

PARTIES

The parties in the United States Court of Appeals for the Second Circuit were the petitioner, Bernat Kupferstein, and the People of the State of New York.

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I. This Court has held that "if a defendant's guilty plea is not equally a voluntary and knowing one, it has been obtained in violation of due process and is therefore void." *Ergo*, a guilty plea "cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." In the case at bar, the petitioner as well as his trial counsel testified that his plea of guilty was motivated by fright and hysterics and was therefore involuntary. 11

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

BERNAT KUPFERSTEIN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINION BELOW

A copy of the opinion of the United States District Court for the Southern District of New York, per Hon. Whitman Knapp, and the decision and order of the United States Court of Appeals, for the

Second Circuit, are annexed as part of the appendix hereto.

JURISDICTION

A. The order of the United States Court of Appeals for the Second Circuit, which affirmed the order and decision of the United States District Court for the Southern District of New York dismissing the Writ of Habeas Corpus was rendered the 1st day of November 1985.

B. The nature of the proceeding was a Writ of Habeas Corpus seeking to vacate the conviction of the petitioner who had pleaded guilty to one count of a multi-count indictment, namely, falsifying business records as a felony. The petitioner stated shortly after the plea of guilty, however, that he did not plead guilty voluntarily;

he had been coerced to do so by his lawyer (Murray Cutler, Esq.); and furthermore, that he was deprived of the effective assistance of counsel during his state court proceedings up to the time that he pleaded guilty.

C. Jurisdiction lies under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED HEREIN

The Fifth, Sixth and Fourteenth Amendments of the United States Constitution are involved herein.

STATEMENT OF THE CASE

Petitioner, Bernat Kupferstein, had originally been indicated along with Rabbi Ferdinand Landau in the Supreme Court, Kings County, State of New York, charged with a number of crimes, including grand larceny

forgery, falsifying business records and violations of the New York General Business Law based upon their supposed participation in certain allegedly illegal real estate transactions over a 15-year period.

Petitioner was only an employee, and not the main principal or driving force of the enterprise which was the target of the investigation. During the proceedings in the Supreme Court, Kings County, petitioner was represented by one Murray Cutler, Esq., and throughout those proceedings maintained his innocence. The trial of the actual case in the Supreme Court, Kings County, commenced, but after several days, suddenly the co-defendant, Rabbi Landau, offered to plead guilty.

The colloquy between the court and the

petitioner revealed that Kupferstein was very reluctant to plead guilty. As a matter of fact, that colloquy, at the time of his plea, clearly demonstrates that reluctance. Kupferstein is not a native born American and is of advanced years.

He obviously wanted to go to trial throughout the proceedings and the question of pleading guilty arose only because of the fact that Kupferstein was a codefendant with Rabbi Landau.

We maintain it is clear from the proceedings in the state court at the time of the plea of guilty, that the petitioner was very reluctant to do so and the allocution reveals that reluctance.

Almost immediately after the plea of guilty was interposed, petitioner hired a

new lawyer and informed the Justice in the Kings County Supreme Court that he wanted to withdraw his plea of guilty and go to trial.

That court, per Justice Lodato, granted a full evidentiary hearing.

During that hearing, the petitioner testified. His former attorney, Murray Cutler, testified. Several other people testified in petitioner's behalf.

It is the inescapable thrust of those proceedings that the petitioner did not want to plead guilty and was anxious to go to trial.

Kupferstein is not a native born American and is of advanced years. He obviously had wanted to go to trial because of the fact that throughout the proceedings, up to that point, he had pleaded innocent.

Almost immediately after entering the plea of guilty and before sentence, Kupferstein complained to several other attorneys about the fact that he had been coerced into pleading guilty. He told this to Cutler as well.

Finally, prior to sentence, Kupferstein retained Irving Anolik, Esq. as his attorney and directed him to make a motion to withdraw his plea of guilty so he could go to trial. The basis for this was that his plea of guilty had not been voluntary, but in fact had been coerced, and that he had been represented ineffectively by his attorney, Murray Cutler.

A motion was made to withdraw the plea of guilty and to permit Kupferstein to to to trial.

Justice Lodato, of the Supeme Court, Kings County, conducted a full evidentiary hearing at which Kupferstein and a number of other people testified. Throughout the testimony Kupferstein in both affidavit and oral statements insisted that he was not guilty and that he wanted to go to trial. Furthermore, he stated that Mr. Cutler had frightened him by telling him that he would go to jail for a long time if he did not plead guilty and insisted that he could not win the case, despite the fact that the trial was in its early stages.

Justice Lodato finally rendered a decision denying Kupferstein's request to withdraw his plea of guilty. Kupferstein was sentenced upon his plea of guilty to one count of falsifying business records in the

first degree (Penal Law § 175.10) to five years' probation and to make $200,000 in restitution. Petitioner has been making the restitution payments, despite great hardship.

An appeal to the Appellate Division of the Supreme Court of the State of New York, Second Department, was taken by Kupferstein but that court affirmed without opinion (100 A.D. 2d 983).

An application for leave to appeal to the New York Court of Appeals was made and denied (62 N.Y. 2d 986).

A petition for writ of certiorari was filed with the United States Supreme Court and that too was denied.

A petition for a writ of habeau corpus was filed pursuant to 28 U.S.C. §2254 and was assigned to Honorable Whitman Knapp,

United States District Judge.

Although Judge Knapp denied the writ, he did grant a certificate of probable cause which permitted an appeal to the United States Court of Appeals.

The United States Court of Appeals affirmed the dismissal of the writ of habeas corpus.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT HAS HELD THAT "IF A DEFENDANT'S GUILTY PLEA IS NOT EQUALLY A VOLUNTARY AND KNOWING ONE, IT HAS BEEN OBTAINED IN VIOLATION OF DUE PROCESS AND IS THEREFORE VOID." ERGO, A GUILTY PLEA "CANNOT BE TRULY VOLUNTARY UNLESS THE DEFENDANT POSSESSES AN UNDERSTANDING OF THE LAW IN RELATION TO THE FACTS." IN THE CASE AT BAR, THE PETITIONER AS WELL AS HIS TRIAL COUNSEL TESTIFIED THAT HIS PLEA OF GUILTY WAS MOTIVATED BY FRIGHT AND HYSTERICS AND WAS THEREFORE INVOLUNTARY.

The Supreme Court of the United States has held that it violates due process of law for a court to accept a guilty plea from an accused who does not knowingly and intentionally enter such a plea.

In the case at bar we can assume that

petitioner was aware of the fact that he was pleading guilty, but we maintain that it was not a voluntary act on his part.

It is necessary to consider the fact that Rabbi Landau, who was the petitioner's boss and also the main defendant in the case, had determined that he wanted to plead guilty. The counsel for Kupferstein, Mr. Cutler, then prevailed upon petitioner to also plead guilty.

The colloquy among the counsel and the judge clearly reveals that Kupferstein insisted very shortly after the plea of guilty, but before the sentence, that he did not want to plead guilty; that he was innocent; and that he wanted to go to trial. At that point in time, we maintain that the prosecution was not seriously prejudiced in any manner and should have permitted, or at least

agreed to the withdrawal of the plea of guilty and a trial.

See McCarthy v. United States, 394 U.S. 459, 89 S. Ct. 1166, 22 L. Ed. 2d 418.

As we have indicated during the earlier passages in this brief, Justice Lodato granted a hearing on petitioner's motion to withdraw his plea of guilty and to go to trial.

It is difficult to fathom why the motion was not granted.

The attorney who represented Kupferstein at the time of the plea of guilty was called by the prosecution during that hearing, namely Murray Cutler, Esq.

Mr. Cutler testified, inter alia, as follows:

> "Q. Mr. Cutler, would it be fair to say that up until the time of trial and the commencement of

> trial, up until that time Mr. Kupferstein consistently claimed that he was innocent; isn't that tr[illegible] A. No doubt about it.
>
> Q. And would it be fair to say that it was primarily because of the negotiations which the other defendant (Rabbi Landau) commenced that the thought of pleading guilty even entered Mr. Kupferstein's mind?.... A. It appears to be so." (A396).*

The attorney for Mr. Kupferstein frankly stated when called by the prosecution (A372):

> "...in hind sight, now I realize that apparently he was very much in a state of fear."

This, of course, refers to the time of the plea of guilty. At A393 of his testi-

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* Numbers in parentheses preceded by the prefix "A" refer to pages of the appendix used in the New York Supreme Court, Appellate Division, Second Department in connection with the appeal from the judgment of conviction to that court.

mony, Mr. Cutler told the state court:

> "I told you before that the man [Kupferstein] was on the verge of hysteria...he was very upset...it was now in the third year of his case. He was very nervous and very upset. He was ve_, depressed at the time."

At A398 of the record, Mr. Cutler further declared:

> Q. Would it be fair to say that Mr. Kupferstein on many occasions had told you that he was really innocent, that he really wanted to vindicate himself and that he really wanted to get this thing over? A. I've said that repeatedly during this hearing. I've said it."

At the hearing before Judge Lodato, petitioner testified that he never wanted to plead guilty. In fact he stated that he had written a letter to his trial attorney insisting that he wanted a speedy trial to clear his name because he was innocent (A249,

250).

On top of this, it was a categorical statement by Kupferstein and this trial lawyer, that he could not even afford to pay the restitution which would be required, so it is obvious that the plea of guilty was an absurdity to begin with.

At page A376 of the proceedings in the state court, Mr. Cutler, the then attorney for Kupferstein, recalled that prior to the plea of guilty, but during its negotiation, he stepped outside with Mr. Kupferstein at which time petitioner told him:

> "...I remember walking outside with Mr. Kupferstein and explaining to him the significance of the plea and he said, if I recall, even to the Court he said something that he is <u>not guilty of anything but he's pleading guilty.</u>

In an affidavit in support of his motion to withdraw his plea of guilty which was dated the 24th day of June, 1981, Kupferstein swore that he did not want to plead guilty and that he was innocent. Furthermore he maintained that his then attorney had so frightened and confused him that he did not know what he was doing (A89-92).

In his affidavit in support of the motion to withdraw that plea of guilty, the petitioner maintained that he was innocent of all the crimes charged, and that he did not want to plead guilty, but was cajoled and frightened into doing so by his then attorney.

Furthermore, Kupferstein swears in his affidavit that he was prepared to take the

witness stand and that he was fully ready to go through the entire trial.

In his affidavit, the petitioner asserts, inter alia, that he did not want to plead guilty because he did not believe he was guilty then, nor does he believe that he is guilty now. He maintains, and persists, in his protestations of complete innocence.

Kupferstein alleges that it was because of confusion and cajoling from his attorney, Murray Cutler, Esq., that he finally pleaded guilty, although it was never his desire to do so.

In his affidavit in support of his motion to withdraw his plea, which was done substantially before the sentence date was set, among other things, Kupferstein alleged (89ff):

"I know that I never had any criminal intent, nor was it ever my desire to commit any crime. Furthermore I contend that I did not knowingly or willfully do anything wrong especially because of the fact that Mr. Landau was really the creator and operator of this entire business and I only performed ministerial functions.

In addition, I could not even afford to meet the terms set forth in the plea of guilty because they are totally unrealistic.

I regret to say that my former attorney, Mr. Cutler, so confused me and created such panic in my mind, that I frankly went along with his suggestion that I plead guilty although in my heart that was never my desire.

The Court will note that even while I was being questioned about whether I wanted to plead guilty, there was substantial doubt expressed by me. For example, I denied that I did anything fraudulent (Minutes of plea, p. 16).

> When asked by the Court whether the entries were untrue, Mr. Kupferstein responded 'I don't know. I don't know. I don't say unquestionably.' (Minutes, p. 17).
>
> Moreover, when asked whether or not there had been reliance on certain papers, I merely said 'They probably relied upon this paper.' (Minutes, p. 18)" (A108-110).

At the time of plea, the trial court indicated that certain conditions would be set for restitution and the like and that the petitioner could have his plea back again in event that the conditions could not be met (A94, 105-110, 115-123).

We informed the trial court below that the conditions could not be met, and yet the court below refused to allow withdrawal of the plea. Thus, at A91 of his affidavit in support of his motion to withdraw the

plea, Kupferstein further alleged:

> "...furthermore, the Court itself indicated that if, for some reason, the arrangements made in the plea bargain could not be carried out, that I would be entitled to have my plea back (Minutes, p. 22). That is what I would want because I not only maintain that I am innocent, but, in addition, the restitution required is totally unrealistic.
>
> I have retained Mr. Anolik in connection with this case and I have relieved Mr. Cutler from this case.
>
> I am aware of the fact that I shall be required to go to trial, but this is what I want to do. In fact, I always wanted to go to trial, and still do.
>
> Since this application is being made well before the 3rd of August, which is the date set for my sentnece at the present time, I submit that the District Attorney cannot be prejudiced in any way.
>
> I am entitled to my day in Court. I have never prev-

> iously been convicted of any crime. I am a deeply religious man and I realize that what I am saying here is under oath and I tell you, under oath, that I am not guilty of the charges which were brought against me."

A perusal of the minutes of sentence will show that the court imposed a considerably less than five-year period for the petitioner to make restitution, despite his protestations that he could not do so, and that it was contrary to the plea minutes.

Yet, a perusal of the plea, page 28, reveals the following colloquy with the court, wherein the court states that the petitioner shall have five years within which to make restitution (A28-30):

> "THE COURT: So, the essence of our disposing of this case is to dispose of it once and for all forever.

Do you know what I mean?

In other words, we are taking a plea here this afternoon to dispose of this case and to dispose of it forever. You make the payments, the People are satisfied, that is the end of the case. You do not come back here again. You are finished. It's over your head will be completed, finished.

Now, in the event I put you on probation, it will be an extended period of time of probation, five years probation where, one, you would have to pay the money either before the expiration of this probation or up until the five years.

Do you understand that?

THE DEFENDANT KUPFERSTEIN: Yes."

At the hearing which was held prior to the imposition of sentence, wherein the issue of permitting withdrawal of the plea was probed by Judge Lodata, Murray Cutler, the attorney for the petitioner, testified for

the prosecution that the petitioner was "on the verge of hysteria" (83)* (A393).

At page 66 of the minutes, Mr. Cutler testified that the petitioner, prior to the plea and during the allocution thereon, told him that "he's not guilty of anything but he's pleading guilty."

In addition, the petitioner told Cutler, according to the latter's testimony, that he was "practically penniless" and that he "had no money" because "Landau [the co-defendant] had taken all the money."

Cutler recalls that at all times, the petitioner had a reluctance to plead guilty (59). Moreover, he stated that Cutler had

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* Numerals in parentheses refer to pages of the official court reporter's minutes of hearing, unless otherwise indicated. Where the prefix "A" is used, it refers to the appendix in the Appellate Division.

been informed by Kupferstein that the latter was only an employee of Rabbi Landau, the co-defendant, and that he was not really involved in any wrongdoing whatsoever.

The attorney, Cutler, stated that because there were 127 counts against Kupferstein, he urged him to try to resolve the plea (A369).

In addition, Cutler testified that the petitioner was worn out and seemed to be very much "in a state of fear" (62) (A372).

At the proceedings prior to the plea, Cutler recalled the trial judge saying that the case "looks like a civil case" and Cutler informed Kupferstein of this sentiment, indicating that if he took a plea the judge would probably be very lenient (A385).

The attorney also testified that the

fact that when a client says guilty in a plea bargain, it does not necessarily mean that he thinks he really is guilty. He pointed out that this is the way things are done during a plea bargain (80) (A390).

Furthermore, Cutler testified that he does not make it a practice of going into any questions or specifics of guilt. That is for the court to determine (81) (A391).

On cross-examination, Cutler admitted that up until the time of trial and the commencement thereof, Kupferstein consistently claimed he was innocent (A396).

In addition, he stated that during the plea negotiations at the time of the plea itself, Kupferstein was very depressed and agitated, and was in "an upset state of mind" (A396-7).

At the proceedings prior to the plea, Cutler recalled the trial judge saying that the case "looks like a civil case" and Cutler informed Kupferstein of this sentiment, indicating that if he took a plea the judge would probably be very lenient (A385).

The lawyer testifying for the prosecution admitted that the case was a triable case, although the court sustained an objection (87) (A397).

He repeated that he never had the petitioner examined by a physician or a psychiatrist, despite the obvious depression and dejection which he exhibited and Kupferstein on many occasions had told him that he was really innocent and wanted to vindicate himself (88) (A398).

In the minutes of November 23, 1981,

Robert Baron, Esq., an attorney, testified that he had represented Kupferstein in certain civil matters in the past. He testified that in around May of 1981 he was informed by the petitioner that the latter was on trial in a criminal proceeding but that he had lost confidence in his trial attorney [Murray Cutler Esq.], and that he believed that his attorney was perhaps better prepared to handle violent criminal cases rather than white-collar type cases.

Mr. Baron stated that he was then told that Mr. Kupferstein had pleaded guilty and was very disturbed about it, as a result of which he referred Kupferstein, after looking at the grand jury minutes himself, to another attorney (6-7) (A152-153).

At this point, we interject the fact

that, over objection, the trial-hearing judge permitted the prosecution to roam far and wide on its cross-examination and its direct examination, concerning matters that had nothing to do with the issue of withdrawing the plea of guilty. That was a very narrow issue and could have been resolved perhaps in a matter of a day or two. Instead the hearing lasted a number of days because the prosecution was permitted to roam into wholly irrelevant areas, such as is illustrated by the far-reaching and irrelevant cross-examination of attorney Baron. The court permitted the prosecution to go into corporate structures, and whatnot.

At the hearing, a motion in limine was made that the court restrict any exam-

ination of the petitioner to the issue of withdrawal of his plea. Particularly in view of the fact that permission to withdraw his plea would entitle the petitioner to go on trial, it was highly prejudicial to permit the prosecution to go beyond the issue raised by the hearing. Despite this fact, the court permitted extensive cross-examination of Kupferstein on every aspect of the case, most of which had nothing whatsoever to do with the withdrawal of the plea of guilty. [See Minutes of December 14, 1981, beginning at pages 1 through 10 (A244-255) and following.]

The salient facts are that Kupferstein proclaimed that he did not want to plead guilty; that he was innocent; and that he was cajoled and, in essence, frightened in-

to pleading guilty, although he was never guilty.

The petitioner stated that he wrote letters to his then attorney, Murray Cutler, Esq., on two occasions, but received no responses, marked "Defendant's Exhibits A and B" (6-9) (A92, A93).

Petitioner testified further at this hearing that his attorney was not really prepared to go to trial because he did not have any in-depth, or even superficial, preparation.

Another letter was sent marked "Exhibit C".

So far as preparation was concerned, the petitioner testified that Cutler told him that it wasn't really necessary to be prepared for trial. Cutler allegedly said

"You don't have to do anything. You will just sit there. You're innocent. You will sit there. The trial is for Landau . . . You're innocent. You just sit there. I will not ask you to be a witness."

Kupferstein further declared that he always maintained his innocence (12) (A254).

Furthermore, petitioner testified that he never authorized Mr. Cutler to arrange a plea of guilty for him (14).

He recalled that after the trial had started and progressed for several days, Cutler asked "How about pleading guilty?" Kupferstein asserted that he responded "Forget about it. Don't even mention this kind of thing to me" (14, 15) (A256-257).

The petitioner further testified that he received constant pressure from this at-

torney time and time again, and he then began to feel that he was not really interested in defending him. Under the circumstances, he felt completely deserted and then believed that he had no choice but to plead guilty because he had a lawyer who was not really interested in defending him (16) (A258).

He asserted that he spoke to other lawyers: a Mr. Baron, a Mr. Hessler, and a Mr. Selzer, and also a Mr. Bisar (17) (A259).

He told all these counselors that he had lost confidence in Mr. Cutler and that Mr. Cutler did not really want to defend him (17) (A259).

He stated that he was very frightened of Riker's Island and that he felt under a great deal of pressure (17, 18).

Moreover, petitioner stated that the financial arrangements set forth in the plea discussions were totally impossible for him to afford (18) (A260).

Additionally, Kupferstein testified that he wanted to have his plea of guilty withdrawn and wanted to go to trial (18, 19) (A260-261).

There was other testimony adduced at the hearing, all indicating that the petitioner always claimed he was innocent and that he was very upset, agitated and frightened; and during the plea discussions themselves, appeared to contest his guilt.

A perusal of the minutes of the plea, furthermore, reveals that the petitioner did not give unequivocal answers of guilt, but, on the contrary, was very equivocal.

Another witness, Irving Heisler, testified for Mr. Kupferstein, stating that he, too, was an attorney at law and that he had contacted the then attorney representing Mr. Kupferstein, prior to the trial herein. Although he had left messages, Mr. Cutler did not return his calls for quite some time, namely March of 1981.

Mr. Heisler recalled that there were certain matters that he felt Mr. Cutler had to know about in order to properly represent Mr. Kupferstein (Minutes 11/23/81, pp. 52-56) (A198-204).

Heisler remembered that when speaking to Mr. Kupferstein, he was informed that the latter had lost his confidence in Mr. Cutler and was convinced that Mr. Cutler could not properly represent him in this

trial. Heisler asserted, however, that he was unable to recommend a substitute attorney on such short notice because the trial was imminent (54-57) (A200-203).

Again, over objection, the court permitted the prosecution to go into vast irrelevant areas on cross-examination. The court attempted to justify this on the basis that the question of restitution was involved and therefore the prosecutor had a right to go into the question of finances.

We submit, however, that the issue was incorrectly analyzed by the courts below, because restitution was irrelevant at that point since the petitioner was seeking to withdraw his plea altogether and go to trial.

It should be noted that Mr. Cutler

himself had testified that the petitioner appeared confused at the time that he pleaded guilty.

At the time of sentence, the court was again reminded that the petitioner protested his innocence and asserted that he did not intend to plead guilty, but was confused and was misadvised by his former attorney, Murray Cutler, Esq. The court nevertheless refused to vacate the plea.

It was pointed out that the petitioner had never previously been in conflict with the law and that the petitioner insisted that he was not guilty (6) (A254-256, A404-409).

At page 7 of the same minutes, the petitioner, at the time of sentence, stated that he was not guilty, and that he didn't

do anything wrong, and that he did not take money from anybody (7-8).

It was further pointed out at the time of sentence that the petitioner did not have the wherewithal to make restitution and was not prepared to do so (9-11) (A410-413).

(It is interesting and significant to note that despite the claims of the prosecution that Kupferstein had made a great deal of ill-gotten gains during the period mentioned in the indictment, the Internal Revenue Service, after auditing Kupferstein's accounts, determined that no change was necessary in his taxes as filed, which we maintain indicates that the IRS found no evidence to support the district attorney's claims that Kupferstein had made a great deal of money through illegal means).

II

PETITIONER TESTIFIED THAT HIS PLEA OF GUILTY WAS NOT VOLUNTARY AND PERSISTED IN HIS CLAIM OF INNOCENCE. HIS TRIAL LAWYER SIMILARLY TESTIFIED THAT KUPFERSTEIN APPARENTLY DID NOT WANT TO PLEAD GUILTY AND WAS "HYSTERICAL". THE COURTS BELOW THEREFORE SHOULD HAVE VACATED THE PLEA.

We have indicated that there was a hearing held before the trial court imposed sentence. The hearing was primarily dedicated to the motion by Kupferstein to withdraw his plea of guilty.

The district judge below felt it was significant that an allocution had been conducted prior to the acceptance of the plea of guilty. We respectfully submit however, that the district judge was incorrect that the allocution was convincing and conclus-

ive.

On the contrary, it is our contention that there was a good deal of equivocation in the colloquy leading up to the plea of guilty. Furthermore the testimony of Kupferstein as well as his then trial lawyer shows that he was hysterical, fearful, nervous and that he did not want to plead guilty. Under such conditions, we believe that a petitioner should be permitted to go to trial. Furthermore, we believe that it is significant that the Court of Appeals in New York in People v. Granello, 18 N.Y. 2d 823, made it quite clear that despite the fact that a person, who during an allocution, said that no promises were made, does not necessarily mean that he is speaking the truth. In the Granello case, the

Court of Appeals made it clear that bland statements that no promises were made are not to be taken as conclusive and hearings are required where later the speaker maintains that he did not mean what he said.

Similarly in Hunter v. Fogg, 470 F. Supp. 1041 (D.C.N.Y., 1979), reversed on other grounds, 616 F. 2d 55, the court held that defendant's pro forma acknowledgement that he understood the sentencing's scope and that there were no off the record promises about sentences, were not necessarily controlling. The District Court there indicated that where defendant seeks to withdraw his plea of guilty on the grounds of a misunderstanding as to what the sentencing possibilities are or otherwise, there must be a very careful review made.

It has further been held that where counsel has misadvised his client into pleading guilty or has given him erroneous information, that the effectiveness of counsel comes into question and this will taint the plea of guilty and require its withdrawal. [United States v. Rumery, 698 F. 2d 764 (5 Cir. 1983)].

It has also been held that since a plea of guilty is also a waiver of constitutional rights, it not only must be voluntary but must be a knowing, intelligent act done with sufficient awareness of relevant circumstances and likely consequences. [United States v. Deal, 678 F. 2d 1062 (11 Cir. 1982)].*

Additionally, the failure to inform the defendant of the nature of the charges

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* See Maine Moulton, __U.S.__, 84-786 Decided 12/10/85.

against him requires automatic reversal of the conviction, and in the case at bar we maintain, vacating a plea of guilty. [United States v. Punch, 709 F. 2d 889 (5 Cir. 1983)].

In Godwin v. United States, 687 F. 2d 585 (2 Cir. 1982), this Court held that the trial court's failure to provide an explanation for the requisite state of mind rendered the defendant's guilty plea invalid. We maintain that Kupferstein certainly did not indicate during his allocation that he knew exactly what he was doing or that he had the requisite state of mind. See also, United States v. Carter, 662 F. 2d 274 (4th Cir. 1981).

The United States Supreme Court has held:

> "A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made by the Court,prosecutor his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business. . ." (Brady v. United States, 397 U.S. 742, 755, 25 L. Ed. 2d 747 quoting from Shelton v. United States, 247 F. 2d 571, 572 n.2, (5 Cir. 1957), reversed on other grounds, 356 U.S. 26, 2 L. Ed. 2d 579).

Thus a plea is not voluntary if it is induced by threats which in the case at bar did emanate from petitioner's own counsel in essence. (Brady v. United States, supra,

Waley v. Johnston, 312 U.S. 275, 286, 85 L. Ed. 830; and United States v. Taylor, 303 F. 2d 165 (4th Cir. 1962)].

In Heidman v. United States, 281 F. 2d 905 (8 Cir. 1960), the Court of Appeals held that a plea of guilty is not voluntary simply because it is the product of sentient choice, but is involuntary if, though it involves a choice, it is the result of duress.

Furthermore it should be noted that in the case at bar, on numerous occasions, the appellant had requested details and specifics of what it was alleged by the prosecution he had actually misappropriated or done improperly. Other than a vast amount of documents, none of which was germane, no specific answer to this inquiry was ever

given to Kupferstein.

This was called to the attention of the trial court but without any remedy being afforded. Thus, we maintain that unfulfilled promises of the prosecutor to detail to Kupferstein what he had actually done wrong were never filled. This too, causes an impediment to the guilty plea under Brady, supra.

See Blackledge v. Allison, 431 U.S. 63, 52 L. Ed. 2d 136; Santobello v. New York, 404 U.S. 257, 30 L. Ed. 2d 427, and McKenzie v. Wainwright, 632 F. 2d 649 (5 Cir. 1980).

Promises or other coercive tactics used to plea bargain is also defective. [See United States v. Gorayska, 482 F. Supp. 576 (D.C.N.Y. 1979)].

In addition to the case at bar, it should be noted that the trial attorney, Murray Cutler, Esq., testified that the petitioner appeared depressed and distracted and in a state of fear. He admitted that he had never had the petitioner examined by a psychiatrist or even caused an inquiry along those lines to be made.

This Court has held that this may very well cause an impediment to a plea of guilty because the mental capacity of the petitioner to have done so was questionable. See Saddler v. United States, 531 F. 2d 83 (2 Cir. 1976). At least a hearing should have been held on the petitioner's mental competency to plead guilty. [United States ex rel McGough v. Hewitt, 528 F. 2d 339 (3 Cir. 1975)].

Furthermore, it has been held that there is a mandatory duty on the trial court to make certain that the plea of guilty is voluntary and to inquire whether the willingness to plead results in disucssions between the government attorney and the petitioner or his attorney. [See McCarthy v. United States, 394 U.S. 459, 22 L.Ed.2d 418; Suggs v. LaVallee, 570 F.2d 1092, 1116 (2 Cir. 1978), cert. denied 439 U.S. 915].

We also remind this Court, most respectfully, that the defense counsel, Murray Cutler, Esq., made no inquiries of his client concerning the plea of guilty because he felt that was a job for the court. Additionally, however, he admitted that the petitioner appeared to be depressed, in

fear, and on the verge of hysterics. Moreover, he admitted that Kupferstein told him that he was innocent but was pleading guilty anyway.

We maintain that this is a clear indication of inadequacy of counsel and for that reason too there should have been a granting of the writ of habeas corpus with a direction to provide a full trial for this petitioner. [See Powell v. Alabama, 287 U.S. 45, 77 L. Ed. 158; Strickland v. Washington, 104 S. Ct. 2052, 80 L. Ed. 2d 674 where the Supreme Court held that the test for determining effectiveness of counsel is whether counsel's conduct so undermines the proper functioning of the adver-

sary process that the trial cannot be relied upon as having produced a just result.]

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

IRVING ANOLIK
Attorney for Petitioner

APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the First day of November one thousand nine hundred and eighty-five.

P r e s e n t: HONORABLE WALTER R. MANSFIELD,
HONORABLE THOMAS J. MESKILL,
HONORABLE RICHARD J. CARDAMONE,
Circuit Judges.

Docket No. 85-2180

BERNAT KUPFERSTEIN,

Petitioner-Appellant,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents-Appellees.

This is an appeal from a judgment of the United States District Court for the Southern District of New York, Knapp, J., denying appellant's petition for a writ of habeas corpus.

This cause came on to be heard on the transcript of record from said district court and was argued by counsel.

The judgment of the district court is AFFIRMED.

The state courts made a finding that petitioner's guilty plea was knowing and intelligent after according him a full hearing on the issue. We defer to the facts found by the state trial courts. 28 U.S.C. § 2254(d); Sumner v. Mata, 449 U.S. 539, 546-47 (1981); Saccomano v. Scully, 758 F.2d 62, 65 (2d Cir. 1985). Petitioner's

subjective state of mind at the time of the plea allocution with regard to his guilt or innocence does not change the result here. North Carolina v. Alford, 400 U.S. 25, 31 (1970).

Petitioner's "hysteria" also did not render the guilty plea involuntary. United States ex rel. Brown v. LaVallee, 424 F.2d 457, 461 (2d Cir. 1970).

The district court properly found that the claim of inadequate representation by counsel was exhausted in the New York courts. Cousart v. Hammock, 745 F.2d 776, 778 (2d Cir. 1984). Petitioner did not even begin to show that but for unprofessional errors the result of the proceeding would have been different. Strickland v. Washington, 52 U.S.L.W. 4565 (U.S. May 14,

1984).

We have considered petitioner's other claims and found them to be without merit.

s/ Walter R. Mansfield
Walter R. Mansfield, U.S.C.J.

s/ Thomas J. Meskill
Thomas J. Meskill, U.S.C.J.

s/ Richard J. Cardamone
Richard J. Cardamone, U.S.C.J.

B. Since this statement does not constitute a formal opinion of this Court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in related cases before this or any other court.

APPENDIX B - MEMORANDUM AND ORDER DATED MAY 30, 1985

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BERNAT KUPFERSTEIN,

Plaintiff,

85 Civ. 0398(WK)

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Defendant.

WHITMAN KNAPP, D.J.

Petitioner Bernat Kupferstein applies to this Court for a writ of habeas corpus stemming from his conviction by entry of a guilty plea to one count of Falsifying Business Records in the First Degree (Penal Law §175.10) after two weeks of trial. Petitioner was sentenced to five years probation and was ordered to pay $200,000 in restitution and $2,400 in trial expenses. He is currently on probation. Petitioner

moved, subsequent to his plea but prior to sentencing, to withdraw the plea and recommence the trial. After a five-day hearing, the court denied his motion with an eight-page written opinion. Petitioner appealed the denial of this motion, which was affirmed without opinion. (2d Dep't 1984) 100 A.D.2d 983. Petitioner sought leave to appeal to the Court of Appeals, which leave was denied. (1984) 62 N.Y.2d 986. His petition for a writ of certiorari to the United States Supreme Court was likewise denied.

In 1977 petitioner Kupferstein was named with one co-defendant in a 124-count indictment charging them with grand larceny, forgery, falsifying business records, and violations of the New York General Business

Law based on their alleged participation in illegal real estate transactions over a 15 year period. Petitioner was a real estate manager. His co-defendant was a prominent and well-respected rabbi. Both were charged with having established phony real estate investment schemes and with having relied upon the rabbi's good reputation in the community to induce others to invest in them.

Petitioner was, from the inception of the case through his plea, represented by one Murray Cutler, Esq. Prior to trial, Cutler moved to dismiss the indictment on the grounds that petitioner had been denied his statutory and constitutional rights to a speedy trial, and in the interests of justice. These motions were denied in 1980.

The case proceeded to non-jury trial before Justice Dominic J. Lodato of the Supreme Court of Kings County in April, 1981. About two weeks into the trial both defendants pled guilty.

In accepting the guilty plea Justice Lodato advised petitioner that the maximum sentence he faced was four years imprisonment, Transcript of Plea at 4; that he was not obligated to incriminate himself; and that he had a right to continue the trial, to cross-examine witnesses and to contest the evidence against him. Id. at 5. Kupferstein stated he understood those rights, had disucssed them with his attorney, and understood he was waiving them. Ibid. He confirmed that he understood English and that he was not under the care of a physic-

ian or taking any medication. Id. at 4.

Petitioner then related that between 1963 and 1976 he agreed to become a contributing partner of Parkview of Hempstead Associates, a real estate partnership. He admitted that the partnership agreement listed his name and that it indicated he had contributed $10,000 to the enterprise. He acknowledged that he in fact had not contributed and never intended to contribute any sum, and that his intention in including himself in the agreement and signing his name thereto was to make money. He received dividends from the partnership based on this supposed contribution from 1963 to 1973. Id. at 14. He balked at characterizing his acts as "fraudulent," id. at 16, and disagreed with his attorney's

statement in response to the court's inquiry that others would "unquestionably" have relied upon the presence of his name and supposed contribution in deciding whether to invest. Id. at 17. In response to further questions posed by the court and the prosecution, however, petitioner agreed that if other potential partners read the agreement they probably relied on it, id. at 18, and that he believed the agreement had been shown to all partners.

When accepting the plea, Justice Lodato notified petitioner that he would be responsible for making restitution in the amount of $200,000 and that $80,000 would have to be paid on or before the date of sentence. Id. at 22-23. Petitioner stated that he understood this, and as well under-

stood his obligation to make restitution in full over whatever probationary period the court imposed. The court explained that if petitioner defaulted on these payments, the court would likely impose a jail sentence. Petitioner indicated that he understood these terms. Id. at 27-28.

After entering the plea and prior to sentencing, petitioner moved to withdraw his plea and recommence the trial. He had in the time between the plea and the motion relieved Cutler as his attorney and retained new counsel who continues to represent him on the instant petition. Petitioner submitted an affidavit in support of the motion which stated that he was not guilty, that he had pled guilty because Cutler had cajoled him, confused him and made him feel

panicked, and because the amount ordered in restitution was "totally unrealistic." With the motion he included letters from two attorneys which stated that in May of 1981 petitioner had contacted each writer and told him he had lost confidence in his lawyer. Each writer related that he had advised petitioner not to change attorneys in the middle of trial.

Justice Lodato ordered that a hearing be held to explore the allegations of the motion. The hearing was conducted over the course of several days and consumed over pages of hearing transcript. Several persons testified, including the two lawyers mentioned above who, in essence, testified as to the contents of the above-described letters. Petitioner testified as

well, maintaining that he was innocent, Transcript of Hearing of Nov. 23, 1981 at 19, that Cutler had pressured him into pleading guilty, and had frightened him by telling him that he might go to Riker's Island if found guilty after trial. Id. at 15-16; 18. These statements caused petitioner to lose confidence in his lawyer. In addition, petitioner stated that he had not received any letters in response to several written inquiries about the case made to Cutler before trial, including a written request that he have a speedy trial, id. at 7, and that the case be dismissed for denial thereof. Id. at 8. Petitioner maintained his innocence based on his performance only of ministerial tasks at the direction of his co-defendnat, id. at 8,

and reiterated his inability to make restitution. Id. at 18. He also asserted that his co-defendant had converted a $10,000 debt owed to petitioner into the $10,000 worth of partnership shares listed as his contribution to the real estate venture. Transcript of Hearing of Jan. 11,1982 at 30-33.

Respondent, the State of New York, called Cutler to testify. Cutler stated that he had represented petitioner during the three-year pendency of the case. Transcript of Hearing of June 1, 1982 at 56. During this time he had made numerous court appearances on his behalf, had communicated with him and had made motions to dismiss the indictment against him. Ibid. He related that his client became increas-

ingly nervous as the date of trial approached, that he constantly maintained his innocence and questioned why he was named in the indictment. Id. at 59. Cutler explained to him over the course of the case that he might have legal liability even for acts done at his co-defendant's bidding.

Plea bargaining on behalf of petitioner began after the trial commenced. Id. at 61. Prior to that time Cutler had informed his client of his possible liability upon conviction in a 124-count indictment. These included a jail term and fines. The plea negotiations lasted for several days. In hindsight Cutler stated that petitioner was extremely afraid, and on the verge of hysteria by the time of the plea. Id. at 62. Cutler had learned that petitioner's co-de-

fendant would very likely enter a plea, and based on this knowledge he explained to petitioner "the problems of a defendant where he's involved with a co-defendant who's going to plead guilty, and not knowing whether or not the other defendant would testify against him." Id. at 63. Petitioner was extremely concerned about the amount of restitution he would be required to make if he pled guilty. Id. at 69. He indicated to Cutler that he was practically penniless because his co-defendant had taken all the money. Id. at 65.

By an eight-page opinion dated July 19, 1982, Justice Lodato denied petitioner's motion to withdraw the plea and proceed to trial. The court reviewed petitioner's grounds for the motion -- his innocence of

the charges, that he had been cajoled into pleading by his attorney, and that he was financially unable to make restitution -- and found that he had not satisfied his burden under the test set forth by the New York Court of Appeals in People v. Miller (1977) 42 N.Y.2d 946. Specifically, the court found the requisite elements of the crime of falsifying business records in the first degree from petitioner's recital of the facts at the time of the plea. In addition, the court found that "[t]he record demonstrate[d] that his lawyer was knowledgeable about the incident and that defendant had received adequate representation" based on Cutler's experience as a criminal lawyer, the length of time he was on the case, his familiarity with the facts

and with the strengths and weaknesses of the case against petitioner and his active participation in more than two weeks of trial prior to entry of the plea. Furthermore, the court found that petitioner had made over 30 court appearances in the case and that he was a bright businessman who had become familiar enough with the workings of the criminal justice system to request his attorney to make a motion to dismiss the indictment for the State's failure to provide a speedy trial. The court concluded that petitioner had understood the maximum period of incarceration faced on the plea, that the court was not making any promises to him, and that he was waiving his rights to continue the trial. Finally, the court rejected petitioner's claimed

inability to make restitution due to his failure to present documentary proof.

EXHAUSTION OF REMEDIES

Petitioner raises three grounds for relief in the instant petition. First, he asserts that his plea was in result of undue influence, coercion and deception. In his recitation of the facts in support of this claim, he explains that his attorney cajoled him into pleading guilty when he did not want to. We construe this first claim as one for ineffective assistance of counsel. We construe his second claim to be that his plea was not voluntary. Third, he claims that he was denied a speedy trial in violation of the Sixth and Fourteenth Amendments.

Respondent urges that, because of pe-

titioner's failure to raise a claim of ineffective assistance of counsel in his brief to the Appellate Division, he has not exhausted his remedies as to it. Respondent raises the same objection with regard to petitioner's claimed deprivation of a speedy trial.

The federal habeas corpus statuted, 28 U.S.C. §§2254(b) and (c), requires that a person in state custody exhaust available state remedies prior to seeking federal habeas review of his conviction. See Picard v. Connor (1971) 404 U.S. 270, 275. Our Court of Appeals instructs that a petitioner must have "set forth in state court all of the essential factual allegations asserted in his federal petition," as well as all legal claims for which he

seeks relief. Daye v. Attorney General (2d Cir. 1982) 696 F.2d 186, 191, cert. denied (1984) 104 S.Ct. 723. Presentation of legal claims to the state courts may be accomplished in any of four ways:

(a) Reliance on pertinent federal cases employing constitutional analysis;

(b) Reliance on state cases employing constitutional analysis in like fact situations;

(c) Assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution; and

(d) Allegation of a pattern of facts that is well within the mainstream of constitutional litigation. Id. at 194.

Petitioner's appellate brief contained two legal points. First, he argued that:

> The court below committed reversible error by denying defendant-appellant's motion to withdraw his plea of guilty and go to trial. During a hearing held on the motion to withdraw the plea, not only did defendant state that he was innocent and had not wanted to plead guilty, but his own trial lawyer testified that the defendant was a state of hysteria and probably confused by what was going on.

His second argument was that:

> The appeallant was denied a speedy trial.

Neither of these legal arguments, nor the cases cited in support thereof, contained any reference to a constitutional claim that petitioner had been deprived of the effective assistance of counsel. However, the factual allegations in support of petitioner's claim that his plea was in-

voluntary featured portions of the hearing testimony to the effect that he was cajoled and frightened into pleading guilty by his lawyer and against his wishes; that by the time of trial he had lost confidence in his attorney; that his lawyer did not know how to handle the defense of persons charged with business, as opposed to violent crimes, that his attorney was not even superficially prepared for trial; that petitioner had never authorized his lawyer to arrange a plea for him; that he was frightened by his lawyer's statement to him that he would be sent to Riker's Island; that he received constant pressure from his attorney to plead guilty, which led him to feel "completely deserted;" and that he eventually believed that "he had no choice but to

plead guilty because he had a lawyer who was not really interested in defending him." We believe this recitation of factual allegations raised questions about the adequacy of assistance of counsel and, as such, presented the claim to the New York State courts under the rule in Daye, supra. See, Cousart v. Hammock (2d Cir. 1984) 745 F.2d 776 (pattern of facts alleged in support of speedy trial claim raised questions about effective assistance of counsel, thus satisfying Daye test as to counsel claim).

Furthermore, the state's appellate response stated that "...defendant has raised a claim for ineffective assistance of counsel." Respondent cited People v. Romero (2d Dep't 1978) 61 A.D.2d 801, 401 N.Y.S.2d 870, in which the court rejected defendant's

argument that he "was deprived of due process of law by the failure of his counsel to furnish him with effective legal representation," 401 N.Y.S.2d at 870, which case relied on a state Court of Appeals case analyzing the question in Sixth Amendment terms. People v. LaBree (1974) 34 N.Y.2d 257, 357 N.Y.S.2d 412. "Since the state correctly understood [on appeal] that [petitioner's] claim was at least partly based on the United States Constitution, we cannot accept its argument years later that the federal claim was not raised," Twitty v. Smith (2d Cir. 1979) 614 F.2d 325, 332, and we thus find that petitioner has exhausted his remedies with regard thereto.

We further find that, in claiming on appeal that he was denied a speedy trial,

petitioner "claimed the deprivation of a particular right specifically protected by the Constitution." Daye, supra at 192. We believe his allegation on appeal that "[t]he appellant was denied a speedy trial" informed the state court that he was invoking the guaranty that "in all criminal prosecutions, the accused shall enjoy the right to a speedy...trial." See Twitty v. Smith, supra, at 332 ("the mention of 'effective assistance of counsel' [in petitioner's appellate brief] instantly calls to mind the Sixth Amendment's guaranty of the accused's right 'to have the Assistance of Counsel for his defense'"). We thus believe that petitioner has exhausted his remedies as to this claim.

THE MERITS

Petitioner's first two claimed grounds for relief--ineffective assistance of counsel and an involuntary plea--were raised in his motion to withdraw the plea and, as such, were the subject of a factual hearing conducted by the state court.

After several days of hearings which occupy over 250 pages of hearing transcript, presentation of witnesses by both sides, and direct and cross-examination of those witnesses, Justice Lodato found that petitioner's plea was knowingly and voluntarily entered. He explicitly found that Cutler had provided adequate representation to petitioner prior and up to the time of his plea. In addition, Justice Lodato found petitioner to be a bright businessman who,

at the time of the plea, had adequately stated the elements of the offense to which he pled, and who fully understood his liability therefor as well as the possible terms of restitution for which he would be held responsible.

These findings, which are embodied in a written opinion, are entitled to deference and a presumption of correctness under 28 U.S.C. §2254(d); Sumner v. Mata (1981) 449 U.S. 539, 546-47; Saccomanno v. Scully (2d Cir. March 22, 1985) No. 83 Civ. 2348. Petitioner can overcome this presumption if he can show that one of the seven exceptions contained in §2254(d) is applicable,[1] or that the state court's findings are not fairly supported by the record, or that the factual determination of the state court

was otherwise erroneous. 28 U.S.C. §2254 (d)(8); see Sumner, supra at 550; Sacomanno supra at 2655. We do not find any of the exceptions enumerated in §2254(d) here applicable, and none are suggested. Nor do we find that Justice Lodato's findings were not fairly supported by the record. Cutler's claimed coercion and poor advice could be seen as having resulted from the performance of legitimate responsibilities of defense counsel; informing a defendant of his possible exposure upon conviction; including the possibility that he might go to jail; informing a defendant of the dangers of remaining on trial when his co-defendant had pled guilty and might become a witness for the prosecution; and recommending that a defendant plead guilty rather

than go to trial. While petitioner might well have been upset by this information, Justice Lodato's conclusion that his legal representation had been adequate is not really open to attack. See Strickland v. Washington (1984) 104 S.Ct. 2052 (ineffective assistance; claimant must show he was deprived of the "reasonably effective assistance" of counsel).

Nor can we say that the court's rejection of petitioner's other arguments was not supported by the record. As the finding that he knowingly and willignly entered his plea was based primarily upon statements made at the time of the plea allocution, Justice Lodato apparently rejected the completely contrary testimony of the witnesses whose credibility he had as-

sessed at the later hearing. We cannot say his findings were not justified.

Petitioner has not otherwise met his burden of showing "by convincing evidence that the factual determination by the State Court was erroneous," 28 U.S.C. §2254(d)(8); Sumner, supra at 550, and we therefore decline to issue the writ under the first two grounds for relief.

Petitioner further alleges that the hiatus between his indictment in 1977 and his trial in 1981[2] denied him of his right to a speedy trial. There is no per se rule as to what constitutes a violation of this right; rather, the court is obliged to proceed on an ad hoc basis by balancing a series of factors, including the length and reason for the delay, the defendant's as-

sertion of his right, and the prejudice resulting therefrom. Barker v. Wingo (1972) 407 U.S. 514, 530-33. Petitioner's bare allegation that the four-year delay was a per se violation of his right to a speedy trial is thus clearly without merit.

In view of the above, the petition for a writ of habeas corpus is dismissed.

So ordered.

Dated: New York, New York
May 30, 1985

WHITMAN KNAPP, U.S.D.J.

FOOTNOTE

1. Section 2254(d) provides that the presumption of correctness shall be overcome if petitioner can establish, or respondent admits:

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in

the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding[.]...

2. In his petition for this writ, Kupferstein erroneously states that trial commenced in 1982.

APPENDIX C - MEMORANDUM AND ORDER DATED JUNE 7, 1985

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BERNAT KUPFERSTEIN,

Plaintiff,

85 Civ.398(WK)

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Defendant.

WHITMAN KNAPP, D.J.

We have considered petitioner's request for a Certificate of Probable Cause to appeal our dismissal of his petition for a writ of habeas corpus. We cannot say that the first two grounds for relief asserted in that petition were frivolous and undeserving of appellate review, and accordingly grant his request with regard to his claims of ineffective assistance of counsel and coercion in the taking of a guilty plea.

However, we found frivolous petitioner's claim that he was denied a speedy trial. His bare assertion that there was a per se violation of his speedy trial rights due to the four-year interval between his indictment and trial is contrary to controlling authority, see Barker v. Wingo (1972) 407 U.S. 514, 530-33. No purpose would be served by appellate review of this claim, and we accordingly decline to issue the Certificate as to it.

SO ORDERED.

Dated: New York, New York
June 7, 1985

WHITMAN KNAPP, U.S.D.J.

No. 85-1052

(2)

Supreme Court, U.S.
FILED
FEB 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court of the United States

October Term, 1985

BERNAT KUPFERSTEIN,

Petitioner,

-vs.-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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22pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Whether defendant's failure to alert the state court to his claim of ineffective assistance of counsel precludes certiorari review of that claim by this Court.

2. Whether the state trial court properly denied defendant's motion to withdraw his guilty plea where, based upon the record of a full evidentiary hearing, it found, that with advice of competent counsel, defendant had waived his constitutional rights, admitted his guilt, and pled guilty with full knowledge of the consequences.

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No. 85-1052

In The Supreme Court of the United States

October Term, 1985

BERNAT KUPFERSTEIN,

Petitioner,

-vs.-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

PRELIMINARY STATEMENT

Respondent, the State of New York, asks this Court to deny the petition for a writ of certiorari, seeking review of the Second Circuit's judgment in this case.

The Second Circuit affirmed the judgment of the United States District Court for the Southern District of New York dismissing the petition of Bernat Kupferstein (hereinafter "defendant") for a writ of *habeas corpus.* Defendant is on probation pursuant to the judgment of the New York Supreme Court, Kings County, entered September 24, 1982, convicting him, after a plea of guilty, of Falsifying Business Records in the First Degree [N.Y. Penal Law §175.10 (McKinney's 1975 and Supp.

1984-85)], and sentencing him to five years' probation, $200,000 restitution, and $2,400 to be paid to the District Attorney's Office for trial expenses.

This Court has previously denied defendant's petition for a writ of certiorari to review the decision of the state appellate court affirming the judgment of conviction.

OPINIONS BELOW

The judgment of the Court of Appeals and the District Court are not officially reported; they are reproduced in defendant's appendix. The judgment of the New York Supreme Court, Appellate Division, Second Department, affirming defendant's conviction, is reported at 100 A.D.2d 983, 473 N.Y.S.2d 898 (2d Dep't 1984). The denial of leave to appeal the affirmance to the New York Court of Appeals is reported at 62 N.Y.2d 986, 479 N.Y.S.2d 1040 (1984). This Court's denial of certiorari to the New York State Supreme Court, Appellate Division, Second Department is reported at __ U.S. __, 105 S. Ct. 248 (1984).

JURISDICTION

The judgment of the Court of Appeals was entered on November 1, 1985. The petition for certiorari was timely filed in this Court on December 17, 1985. This Court has jurisdiction of the petition pursuant to 28 U.S.C. § 1254(1).[1]

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[1]Defendant incorrectly invokes jurisdiction under 28 U.S.C. § 1257 which authorizes review of a decision of the highest state court.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. V

No person shall be . . . compelled in any criminal case to be a witness against himself.

U.S. Const. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

U.S. Const. Amend. XIV §1

No state shall . . . deprive any person of life, liberty or property, without due process of law. . . .

STATEMENT OF THE CASE

Introduction

In 1977, defendant and Ferdinand Landau were indicted in Kings County, New York, for 124 counts of grand larceny, forgery, falsifying business records, and violations of the New York General Business Law. These charges arose out of numerous illegal real estate transactions occurring over a fifteen-year period and involving millions of dollars.

On April 28, 1981, defendant and Landau waived a jury and proceeded to trial. After two weeks of testimony, involving hundreds of exhibits, defendant and Landau pled guilty. Before sentence, defendant moved collaterally to withdraw his plea. After a full hearing, the court denied his motion and sentenced him according to the promise made at the time of the plea.

Defendant's conviction was affirmed without opinion by the Appellate Division, Second Department, 100 A.D.2d 983, 473 N.Y.S.2d 898 (2d Dep't 1984), and leave

to appeal to the Court of Appeals was denied, 62 N.Y.2d 986, 479 N.Y.S.2d 1040 (1984). Defendant's petition to this Court for a writ of certiorari to the New York State Supreme Court, Appellate Division, Second Department was also denied, __ U.S. __, 105 S.Ct. 248 (1984).

Defendant then brought the application for a federal writ of *habeas corpus* that is the basis for this petition. On May 30, 1985, the United States District Court for the Southern District of New York denied the application but granted petitioner a certificate of probable cause to appeal to the Court of Appeals for the Second Circuit (Knapp, J.). On November 1, 1985, the Court of Appeals affirmed the judgment of the District Court. This petition followed.

The Plea

On May 12, 1981, on the advice of counsel, defendant entered a plea of guilty to one count of Falsifying Business Records in the First Degree in full satisfaction of the indictment (A. 95-96).[2] Defendant stated that he had ample opportunity to discuss the case with his attorney, and that he was pleading guilty because he was in fact guilty (A.96).

The court explained that by pleading guilty defendant was confessing his guilt and waiving his right to continue the trial (A.97). The court advised defendant that he was not obligated to incriminate himself, and that he had the right to continue the trial, to cross-examine witnesses and to controvert the evidence against him (A.97-98). Defen-

[2]Landau was also convicted, on a plea of guilty, of Falsifying Business Records in the First Degree (New York Penal Law §175.10). He was sentenced to five years' probation, $300,000 restitution, and $2,600 to be paid to the District Attorney's Office. He never sought to withdraw his plea and never appealed his conviction.

Numbers in parentheses preceded by the letter "A" refer to page numbers of Defendant's Appendix used in the court below. Numbers in parentheses preceded by the letter "B" refer to page numbers of Respondent's Appendix used in the court below.

dant confirmed that he understood these rights and that his attorney had discussed them with him (A.98). Defendant acknowledged that he was entering the plea voluntarily, that he had not been promised anything in return for his plea, and that he was not currently under the care of a physician or taking any medication (A.96-98).

Defendant admitted that during the period of February 5, 1963 through April 1976 he had participated in a real estate arrangement whereby he agreed to be a contributing partner of Parkview of Hempstead Associates (A.99-100). Toward that end, he signed an instrument stating that he had contributed $10,000 to the enterprise when, in fact, he had not contributed any money (A.100-109). His intent in making the false entry was to make money for himself at the expense of the other partners (A.101). Over the years, the other partners relied on defendant's false contribution statement and defendant received profits from the real estate transactions (A.107-11).

The court indicated that it would probably impose a sentence of five years' probation (A.119-20), and as a condition of probation it would require restitution in the amount of $200,000 to the victims, plus $2,400 to be paid to the Office of the District Attorney (A.119, 139). The court would require the defendant to pay $80,000 on or before the sentence date (A.116), and the balance within four or five years, on a payment schedule to be determined at the time of sentence (A.119). If the court decided it could not keep its promise, then it would allow defendant to withdraw his plea (A.115).

Defendant acknowledged that he understood the conditions of the plea, and that he took the plea in order to dispose of the case once and for all (A.116-21).

Motion and Hearing to Withdraw the Plea

In an affidavit dated June 24, 1981, defendant moved in State Supreme Court, before the same judge who had taken his plea, for permission to withdraw the plea. He claimed that he was innocent of all crimes, but had pled guilty because his attorney had coerced him (A.89-91). The court ordered a hearing to determine defendant's claim.

The principal witnesses at the hearing were defendant BERNAT KUPFERSTEIN and MURRAY CUTLER, the attorney who had represented him at the plea. Defendant testified that he had retained Mr. Murray Cutler to represent him in this case in 1978 (Kupferstein: A.248). Prior to trial defendant wrote to Mr. Cutler about his case. He received no letters in response (Kupferstein: A.250-53), but he did speak with Mr. Cutler about the case before trial (Kupferstein: A.254). After the trial began, Mr. Cutler asked defenant if he wanted to plead guilty, but defendant said no (Kupferstein: A.256). When Landau decided to plead guilty, Mr. Cutler put pressure on defendant to do so also (Kupferstein: A.257). Defendant felt he had no choice but to plead guilty (Kupferstein: A.257).

At this point defendant consulted two other attorneys, ROBERT BARON and IRVING HEISLER, who advised him not to change attorneys in the middle of trial (Kupferstein: A.259; Baron: A.152; Heisler: A.201). Defendant felt that if he did not plead guilty, Mr. Cutler would not properly defend him (Kupferstein: A.259). Defendant testified that Mr. Cutler frightened him into thinking that he might go to jail if he did not take the plea (Kupferstein: A. 159-260). He decided to take the plea and to appeal later (Kupferstein: A. 259).

Defendant claimed that he was innocent because he only carried out the ministerial functions that Landau had

ordered him to perform (Kupferstein: A.245). Defendant admitted that the Parkview Associates partnership agreement accurately represented his false statement that he had contributed $10,000 of capital towards the purchase price of the property (Kupferstein: B. 29-30).[3]

Attorney Murray Cutler represented defendant during the three-year course of the case (Cutler: A.366). He made numerous court appearances, filed motions, and communicated with defendant on many occasions (Cutler: A.366-67).

At the beginning of the case, Mr. Cutler told defendant that the prosecutor had offered a plea. If defendant admitted his guilt, he would have to go to jail for ninety days and would have to pay $1,000,000 restitution (Cutler: A.368). Defendant did not want to plead guilty because he believed that he was not culpable (Cutler: A.368). Defendant claimed that Landau had masterminded the scheme and that he had just followed Landau's orders (Cutler: A.383). Mr. Cutler explained to defendant that he was culpable even though his role in the fraud had been less important than Landau's role (Cutler: A.383). Mr. Cutler also made defendant aware of the consequences of going to trial on a 124 count indictment (Cutler: A.369).

After two weeks of the trial, Landau decided to plead guilty (Cutler: A.370). Mr. Cutler and defendant discussed all of defendant's options and the consequences of entering a guilty plea. Mr. Cutler advised defendant that it was in his best interest to dispose of the case rather than to continue with the trial, because if he were convicted,

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[3]Defendant claimed that by a separate agreement, Landau had owed him $10,000 as a finder's fee and for management of the property. Landau then converted this debt to shares in the partnership (B.30-33).

defendant faced a possible jail term (Cutler: A.369-70). While defendant was upset about the prospect of admitting his guilt, he seemed to understand all the options (Cutler: A.370, 393-394). Once defendant decided to plead guilty, his main concern was to pay as little restitution as possible (Cutler: A.78-79).

Decision on the Motion to Withdraw the Plea

In a decision dated July 19, 1982, the court denied defendant's motion to withdraw his plea (B.75).

The court found that Mr. Cutler was an experienced criminal attorney who had effectively represented defendant over the three-year course of the proceedings (B.70, 74). Mr. Cutler had appeared in court on this matter over thirty times. He had made discovery motions, and, at defendant's request, had moved to dismiss the indictment in the interest of justice and on the ground that defendant had been denied his right to a speedy trial (B.70). Moreover, prior to the plea, Mr. Cutler had participated in nearly two weeks of trial which involved over 500 exhibits (B.71).

As the trial progressed, defendant became increasingly apprehensive and nervous (B.71). When Landau pled guilty, Mr. Cutler advised defendant that it was in his best interest to do the same (B.71).

On May 12, 1981, defendant did plead guilty (B.71). At that time the court advised defendant of all his constitutional rights, and defendant acknowledged that he understood them (B.72-73). Defendant admitted his guilt (B.71-72). At no time did defendant claim innocence, nor did he ever indicate that Mr. Cutler had forced him to take the plea (B.71). Indeed, defendant, who is an intelligent businessman, understood all of his options and knew just what he was doing when he pled guilty (B.74).

The court found that defendant had unequivocally asserted that he would pay $200,000 restitution (B.74). There was no change of circumstances which would keep him from meeting that obligation (B.74).

The Sentence

Defendant was sentenced on October 25, 1982, to five years' probation and to make restitution of $200,000, plus $2,400 to be paid to the Office of the District Attorney for expenses incurred during trial before defendant pled guilty (A.414-15). Defendant was ordered to pay an initial $40,000 on the date of sentence, plus $40,000 every three months beginning January 15, 1983 (B.63).[4]

The State Appeal

In his brief to the New York State Supreme Court, Appellate Division, Second Department, defendant raised two issues: That he was denied his right to a speedy trial and that his plea was entered involuntarily. The Appellate Division affirmed the judgment of conviction without opinion. *People v. Kupferstein,* 100 A.D.2d 983, 473 N.Y.S.2d 898 (2d Dep't 1984). Defendant raised the same claims in his application to the New York Court of Appeals for leave to appeal the Appellate Division's order. The Court of Appeals denied his application. *People v. Kupferstein,* 62 N.Y.2d 986, 479 N.Y.S.2d 1040 (1984). Defendant's petition to this Court for a writ of certiorari to the New York Supreme Court, Appellate Division, Second Department, was also denied. *Kupferstein v. New York,* __ U.S. __, 105 S.Ct. 248 (1984). In that application defendant reiterated the same two claims and added the claim that he had been denied effective assistance of counsel.

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[4]Thus far, defendant has paid a total of approximately $160,000 to the Department of Probation. In March of 1985 defendant paid $115,084.21. In addition, he made three separate $10,000 payments in May, July, and September, and a payment of $15,000 in December of 1985.

The Federal Proceedings

Defendant then filed a petition for a writ of *habeas corpus* with the United States District Court for the Southern District of New York. He raised the same three claims he had advanced in his certiorari petition: speedy trial, ineffective assistance of counsel, and involuntary plea. The District Court held that all three claims had been exhausted, and, relying on the presumptively correct state court findings, held that they were without merit. The District Court thus dismissed defendant's petition, but granted a certificate of probable cause to the Court of Appeals for the Second Circuit as to the latter two claims (Knapp, J.). Defendant raised the two certified claims in the Second Circuit, and that Court, also relying on the state hearing court's findings of fact, affirmed the District Court's dismissal of the petition. This petition followed.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Defendant Never Properly Presented His Ineffective Assistance Of Counsel Claim To The State Courts, And Therefore It Is Not Properly Before The Federal Courts On This Petition For Habeas Corpus; Moreover, The Claim Is Without Merit.

Defendant never asserted in any state court that he was denied his Sixth Amendment right to effective assistance of counsel. He claimed only that his plea was involuntary. Although defendant alleged facts in his state court brief which, viewed in their most favorable light, might possibly suggest an ineffective assistance of counsel claim, he never actually presented that claim. *See Anderson v. Harless,* 459 U.S. 4, 6 (1982). Instead he relied on those facts to support his voluntariness claim. He argued that because he was dissatisfied with his attorney's preparedness and ability to defend him, and afraid of

what would happen if he continued with the trial, he thought he had no choice but to plead guilty, although he did not want to do so (Defendant's State Brief at 14, 19). He also claimed that he would not have pled guilty if his attorney had not cajoled and frightened him (Defendant's State Brief at 13, 19-20).

Defendant, however, never claimed that his attorney was so unprepared or so unable to defend him as to be ineffective. Nor did he argue that his attorney's conduct in cajoling and frightening him rose to the level of incompetency. He chose not to raise that claim, focusing instead on the voluntariness issue. Under these circumstances, defendant failed to inform the state court of his ineffective assistance of counsel claim, and has thus failed to exhaust his state remedies with respect to that claim. *Id.; Picard v. Connor,* 404 U.S. 270 (1971). As a result, the claim was not properly before the federal courts on this petition for *habeas corpus,* and the merits of the claim are not properly before this Court.

Moreover, the record shows that the claim is utterly without merit, as the federal courts below found. In defendant's state court collateral attack on his guilty plea pursuant to New York Criminal Procedure Law §440.10, he claimed that the plea was involuntary, in part, due to the actions of counsel. Although defendant never specifically alleged ineffective assistance of counsel, the hearing on the collateral attack necessarily presented the court with all the testimony relevant to such a claim. The court obviously found defendant's testimony incredible as it denied defendant's application to withdraw the plea.

In any event, the record clearly supports the decision of the federal *habeas* court to reject the claim. The record demonstrates that counsel, an experienced trial attorney,

appeared in court over thirty times. Counsel filed all appropriate discovery motions and two motions to dismiss the indictment. Defendant and counsel communicated frequently about the case and complete advice was given on the benefits and detriments of pleading guilty. Nothing in the record indicates that counsel supplied any misinformation to defendant.

The prosecution's initial plea offer included ninety days' incarceration and $1,000,000 restitution. Defendant's sentence on the plea was probation and $200,000 restitution. Considering the potential liability of four years' incarceration and the strong evidence of guilt, it can hardly be said that the advice of counsel to accept the offer was outside the range of reasonable professional advice, or rendered an unjust result. *See Strickland v. Washington,* __ U.S. __, 104 S.Ct. 2052 (1984).

2. Neither Defendant's Claim Of Innocence Nor His Challenge To The Voluntariness Of His Guilty Plea Raises A Substantial Federal Question.

Defendant treats this, his second petition for a writ of certiorari to this Court, as though it were just another appeal to a court with plenary jurisdiction over the issues raised below. Defendant fully litigated below his claim that the plea was involuntary and unknowing, and now he simply seeks to relitigate the claim before this Court. This Court refused to hear this same claim when defendant sought a writ of certiorari to the state court, and nothing has changed since then to warrant this Court's hearing the claim now on a writ of certiorari to the federal court.

As the Second Circuit correctly held, defendant knowingly and willingly pled guilty, and thus was not entitled to withdraw his guilty plea. That conclusion was based on the trial court's presumptively correct factual

findings, *see Sumner v. Mata,* 449 U.S. 539, 546-47 (2d Cir. 1981), made after a full evidentiary hearing which afforded defendant due process. *See Blackledge v. Allison,* 431 U.S. 63 (1977). It is clearly supported by the record which shows that defendant knowingly and voluntarily waived his constitutional rights and pled guilty with full knowledge of the consequences.

The record amply supports the trial court's finding that defendant was an intelligent businessman, who, while competently represented by a knowledgeable and experienced attorney, knowingly waived his constitutional rights and pled guilty with full knowledge of the consequences. He was fully aware of the charges against him and without equivocation recited his own culpable conduct to each element of Falsifying Business Records in the First Degree, one of the 124 counts in the indictment. The trial court found no merit in defendant's claim that he had relied on certain unfulfilled promises regarding the amount and payment schedule of restitution.

The standards employed by the trial court were those enunciated in *People v. Miller,* 42 N.Y.2d 946, 398 N.Y.S.2d 133, 367 N.E. 640 (1977), and guaranteed that the plea represented a "voluntarily and intelligent choice among the alternative courses of action open to defendant" as mandated by federal law. *North Carolina v. Alford,* 400 U.S. 25, 31 (1970); *Santobello v. New York,* 404 U.S. 257 (1971); *Boykin v. Alabama,* 395 U.S. 238 (1969). The trial court recognized that assertions of innocence are significant in determining whether a plea may be withdrawn, but it found defendant's assertions irrelevant and incredible. Essentially defendant's claim of innocence was based upon a belief that he could not be criminally culpable for actions made on behalf of his co-defendant employer. This legal theory was incorrect. Thus, as a factual matter, defendant did not effectively

deny his culpability and there was no reason to permit him to withdraw his plea. *United States v. Barker,* 514 F.2d 208, 220 (D.C. Cir.), *cert. denied,* 421 U.S. 1013 (1975).[5]

Absent a constitutional violation, if the advantages of the plea bargaining system are to be secured, a guilty plea must be accorded a great measure of finality. *Blackledge v. Allison,* 431 U.S. 63, 72 (1977). This petition raises only factual issues, of interest to defendant only, in well settled areas of the law. This Court has long held that it does not grant certiorari to review evidence and discuss specific facts. *United States v. Johnston,* 268 U.S. 220, 227 (1925). The petition points out no constitutional error in the court below. The record demonstrates strong evidence of guilt and raises no legal issue worthy of this Court's review.

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[5]It is well settled that even where contemporaneous with a guilty plea a defendant claims innocence, the plea may nonetheless be accepted if there is strong evidence of guilt. *North Carolina v. Alford,* 400 U.S. 25 (1970); *United States ex rel. Dunn v. Casscles,* 494 F.2d 397 (2d Cir. 1974). In the instant case, the guilty plea came two weeks and 500 exhibits into the trial. In addition, defendant confessed to each element of the crime at the plea hearing. The record as a whole demonstrates the strong evidence of guilt that was before the court when it accepted the plea.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: Brooklyn, New York
February 15, 1986

Respectfully submitted,

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